

No. 10560

United States
Circuit Court of Appeals
For the Ninth Circuit

E. J. JONES,

Appellant,

VS.

JIM BRUSH, State Treasurer of the State of Arizona, SIDNEY P. OSBORN, Governor of the State of Arizona, DAN E. GARVEY, Secretary of State of the State of Arizona, MARICOPA COUNTY, JOHN A. FOOTE, ED. OGLESBY and PHIL ISLEY, Constituting the Board of Supervisors of Maricopa County, Arizona,

Appellees.

APPEAL FROM UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF ARIZONA

APPELLANT'S REPLY BRIEF

FILED

JAN 6 - 1944

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The briefs heretofore filed in this case, and Case No. 10493, in this court, appear to cover every con-

tention advanced by appellees, except the proposition that this is a suit against the state. This proposition, to which the major part of the first 37 pages of ap-

pellees' brief is devoted, is without merit, for the following reasons:

1. The title of the lands donated to the state by the Enabling Act is subject to certain conditions and restrictions imposed by the United States, as donor. One of these conditions is that said lands and the proceeds therefrom shall be used for certain specified purposes, and use thereof for any other purpose shall be prevented by proceedings brought by the United States Attorney General, and may be prevented by the state or any citizen thereof. These conditions and restrictions are accepted by the state in the State Constitution.

Par. Twelfth, Art. 20 Ariz. Constitution

Secs. 1, 2, 7, 8, Art. 10, Ariz. Constitution.

See Secs. 1, 2, Exhibit A, Appellees' Brief.

It follows that any state official who uses his official position to dispose of any of said lands or the proceeds thereof, in a manner otherwise than in faithful compliance with the provisions of the Enabling Act, is acting, not on behalf of the State, but in violation of the Constitution of the State as well as the Enabling Act, and any suit brought to restrain such acts on his part is not a suit against the State, but is a

suit against a recreant or misguided state official to compel him to observe the State Constitution as well as the federal laws.

Ex Parte Young, 209 U. S. 123, 52 L. Ed. 714,
28 Sup. Ct. Rep. 441,

Hopkins v. Clemson College,
221 U. S. 636;
55 L. Ed. 890;
31 Sup. Ct. Rep. 654.

2. The State has expressly consented to the provisions of the Enabling Act.

Par. Twelfth, Art. 20, Ariz. Constitution.
And such consent is a waiver of the state's immunity from suit, for Sec. 28 of the Enabling Act expressly provides for the enforcement of the Enabling Act by suit. (p. xix, Exhibit B, appellees' brief).

Clark v. Barnard, 108 U. S. 436, 437;
27 L. Ed. 780;
2 Sup. Ct. Rep. 878.

Georgia v. Chattanooga, 264 U. S. 472;
68 L. ed. 796;
44 Sup. Ct. Rep. 369.

3. The jurisdiction of the federal courts to enforce the restrictions imposed upon the disposition of funds derived from the sale of lands donated by state Enabling Acts, is established by the authorities.

King County v. Seattle School Dist.,
263 U. S. 361;
68 L. Ed. 339;
44 Sup. Ct. Rep. 127.

Ervien, Commissioner of Public Lands, vs. U. S.
251 U. S. 41;
64 L. Ed. 128;
40 Sup. Ct. Rep. 75.

4. Such a suit as is brought by plaintiff in this case is not a suit against the State, but is a suit against certain persons who are proposing to use their official position to violate both the Constitution of the State, and the Enabling Act. Under the laws of Arizona, a citizen and taxpayer may sue to restrain them from such violation. There is nothing in the State law restricting such an action to the State courts. Furthermore, whenever a citizen of the State may maintain an action to establish a right, privilege or annuity under a federal act, he may bring an action in the Federal courts, under *Sec. 41, Title 28, U. S. Code Ann.* The right of the plaintiff as an individual to enforce the provisions of the Enabling Act is derived from the State law, but the nature and character of the right is determined by the Enabling Act. The Enabling Act is accepted by the Constitution of the State. This acceptance creates a contract between the United States and the State. Rights claimed under this contract are necessarily determined by the meaning and effect of the Enabling Act, and determination of such meaning and effect presents a federal question of which the Federal courts have jurisdiction under *Sec. 41, Title 28, U. S. Code Ann.*

5. The right of the plaintiff to sue as a citizen and taxpayer of the State is a general right to sue under the State law. Said right is not limited to the State courts, and under the Federal Constitution and *Section 41, Title 28, U. S. Code Ann.*, the Federal courts have jurisdiction of such a suit as they do of any other suit in which the rights sought to be enforced depend upon the proper meaning and effect of a Federal law.

6. The provisions of *Sec. 28 of the Enabling Act*, for the enforcement of the trusts created by that Act, expressly provide that the Attorney General of the United States may bring the action to enforce the trusts in the Federal court, and then, further provide that the right of action in the United States Attorney General shall not limit the power of the State or any citizen thereof to enforce the provisions of the Act. This clearly indicates that the right of the United States Attorney General and the State and the citizens thereof, to enforce the Act, have the same object—that is, to enforce the provisions of the trust created by the Enabling Act. If appellees' contention were adopted and it were held that the State or its citizens could sue only in the State courts, the result would be that there would be two independent provisions for the enforcement of the trusts in different courts, who might reach different conclusions. The result might be that if a case like this were brought in the State court and a judgment entered in favor of the defendants, and another suit were brought by the United States Attorney General in the Federal courts, a different judgment might be entered, with the result that there would be a judgment in the State courts holding one thing, and a

judgment in the Federal courts reaching a different result, and each of them be final. Such a result is not contemplated by the provisions of the Enabling Act. Said act simply provides that the United States Attorney General may enforce the act, and that the State and its citizens may enforce the act. Undoubtedly, the latter may resort to the State courts, but if they do, a decision of the State courts is subject to writ of certiorari and appeal, the same as any other proceeding in the State courts involving the construction of a Federal Act, and likewise, the State, or its citizens, may resort to the Federal courts in the first instance, upon the ground that a federal question is involved.

7. The argument that the action of the State officials is not subject to judicial review is without merit.

Rowland v. State Loan Board, 24 Ariz. 116,
207 Pac. 359.

Ervien v. Commissioner of Public Lands,
251 U. S. 41;
64 L. Ed. 128;
40 Sup. Ct. Rep. 75.

See pages 53-57, Appellant's Brief.

For the foregoing reasons, appellees' contention that this suit is a suit against the State, is wholly without merit.

The other contentions in appellees' brief have been

fully considered in appellant's opening brief, and in the briefs in Case No. 10493. We respectfully submit that the decision of the District Court must be reversed.

Respectfully submitted,

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